

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TOTAL PETROCHEMICALS USA, INC.

Complainant,

v.

Docket No. NOR-42121

**CSX TRANSPORTATION, INC; CAROLINA
PIEDMONT DIVISION; GEORGIA
WOODLANDS RAILROAD, LLC;
MADISON RAILROAD; MOHAWK,
ADIRONDACK & NORTHERN RAILROAD
CORP.; NASHVILLE AND EASTERN
RAILROAD CORP.; NEW HOPE &
IVYLAND RAILROAD; PIONEER VALLEY
RAILROAD; R.J. CORMAN RAILROAD
COMPANY (MEMPHIS); SEMINOLE
GULF RAILWAY L.P.; SEQUATCHIE
VALLEY RAILROAD COMPANY; AND
SOUTH BRANCH VALLEY RAILROAD**

Defendants.

228344

**APPEAL OF DECISION DENYING THE
FIRST MOTION TO COMPEL OF
TOTAL PETROCHEMICALS USA, INC.**

TOTAL PETROCHEMICALS USA, INC. ("TPI"), pursuant to 49 CFR §§ 1114.31(a)(4) and 1115.9, submits this Appeal of the decision of the Director of the Office of Proceedings, served on November 24, 2010, which denied TPI's "First Motion to Compel" ("Motion"). TPI's Motion requests the Surface Transportation Board ("Board" or "STB") to issue an order compelling CSX Transportation, Inc. ("CSXT") to respond to requests for production of CSXT's internal costs. TPI has attached its Motion as Exhibit 1. In this pleading, TPI addresses why the Board should reverse the Director's decision.

PUBLIC VERSION

The Director's decision denied TPI's Motion because "[t]he Board has been clear and consistent in its prior determinations that internal costing data are not discoverable in rate reasonableness proceedings," and "TPI has not presented evidence or arguments that would lead the Board to depart from this well-settled precedent." Decision at 3. TPI acknowledged this precedent in its Motion, but noted that virtually every such decision denied internal costing data that had been requested in the context of stand-alone cost ("SAC"), whereas TPI's requests were presented in the context of market dominance. Nevertheless, the Director gave dispositive weight to *dicta* in the Board's prior precedent to conclude that the Uniform Rail Costing System ("URCS") is to be used for all regulatory purposes, including qualitative market dominance. *Id.* Such statements are clearly *dicta* because the Board was not asked to address the relevance of internal costs to qualitative market dominance in any of those decisions.

In only one decision has the Board ever addressed the relevance of internal costs to market dominance. In Potomac Electric Power Co. v. CSX Transportation, Inc., 2 S.T.B. 290, 294 (1997) ("PEPCO"), the plaintiffs sought to use internal costs to show that a considerably lower rate would still be very profitable for the railroads. The Board denied discovery of internal costs because it does "not use rate-cost relationships as a basis for qualitative market dominance determinations." *Id.* That is not why TPI has requested CSXT's internal costs.

In this proceeding, CSXT has alleged that intermodal transportation, in the form of rail-truck transloads, provide effective competition in 78, which is approximately three-quarters, of the case lanes, {{ [REDACTED] }}¹ "Motion for Expedited Determination of Jurisdiction Over Challenged Rates," Verified Statement of Gordon R. Heisler, pp. 13-15 (filed Oct. 1, 2010). According to

¹ Information in double brackets {{...}} has been designated "HIGHLY CONFIDENTIAL" pursuant to the Board's Protective Order in this proceeding.

PUBLIC VERSION

CSXT, this is such clear and compelling evidence that it lacks market dominance that the Board should deviate from the procedural schedule in this case to decide market dominance before the parties submit evidence on rate reasonableness.

In opposition to CSXT's Motion, TPI has cited to extensive precedent that the existence of an intermodal alternative at rates at or below a rail carrier's rates is not dispositive of effective intermodal competition. Ariz. Pub. Serv. Co. v. United States, 742 F.2d 644, 651 (D.C. Cir. 1984) ("Arizona") ("[T]he mere existence of some alternative does not in itself constrain the railroads from charging rates far in excess of the just and reasonable rates that Congress thought the existence of competitive pressures would ensure."); E.I. DuPont de Nemours & Co. v. CSX Transp., Inc., STB Docket No. 42099, slip op. at 7 (served June 27, 2008) ("Even if we were to find that the cost of [an alternative] is similar to the cost of using rail . . . , it does not follow that the threat of [the alternative] is evidence of effective competition."). An alternative mode's pricing may be a poor indicator of effective competition because the pricing may merely create an "outer limit" rather than an effective competitive constraint. Id., at 8; FMC Wyo. Corp. v. Union Pac. R.R., 4 S.T.B. 699, 718 (2000) ("FMC") ("[An] alternative does impose an outer limit on the rate that [a carrier] can charge, although [the carrier] can exercise considerable market power before reaching that outer limit."); Arizona, 742 F.2d at 651 ("At some point the availability of an alternative such as the horse and buggy or even people carrying oil in buckets theoretically prevents railroads from raising their rates beyond an outer bound.").²

TPI has requested CSXT's internal costs in order to prove that the transload alternatives identified by CSXT are not an effective competitive constraint upon CSXT's rates. If CSXT is earning substantial profits on TPI's traffic at rates that are comparable to higher cost transload

² The Director's decision, at 3, summarily dismisses TPI's citation to FMC, because the Board did not rely upon internal costing data when it reached these conclusions. But that is beside the point, if the plaintiff never requested such evidence. Here, TPI has both requested this information and demonstrated its relevance.

PUBLIC VERSION

operations, that would be highly relevant to determining whether the transload alternative is an effective competitive constraint upon CSXT's rates or merely an "outer limit" below which CSXT can still exercise considerable market power. URCS costs cannot be used for this evaluation. Only CSXT internal costs can be used because these are the costs CSXT uses to set rates and identify profits.

Unlike SAC, which is based upon a hypothetical railroad, qualitative market dominance is based upon real world economic factors. The rail industry, including CSXT, has never claimed that it makes pricing decisions based upon URCS. Indeed, the existence of separate internal cost systems by which railroads make internal business decisions is well known, and railroads have vigorously opposed their production in all regulatory proceedings. See PEPCO. The qualitative market dominance test asks whether there is "effective" competition from other rail carriers or other modes of transportation in the real world. Therefore, it is important to conduct that analysis based upon the costs that a railroad uses in the real world when it decides whether a shipper's alternative transportation option is a true competitive threat.

Finally, TPI attached as Exhibit B to its Motion an internal CSXT document that showed the relevance of CSXT's internal costs to CSXT's market dominance claims in this proceeding. The Director's decision does not address this document, perhaps because of its "HIGHLY CONFIDENTIAL" designation under the protective order. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

PUBLIC VERSION

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

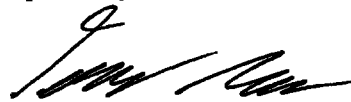
[REDACTED]

[REDACTED]

[REDACTED]. }} This information, which is not available from any other source, would be valuable to TPI's ability to demonstrate that the comparably priced transload alternatives identified by CSXT are not effective competitive constraints upon CSXT's pricing.

For the foregoing reasons, TPI respectfully requests that the Board reverse the Director's decision and grant TPI's First Motion to Compel.

Respectfully submitted,



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November 30, 2010

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that this 30th day of November 2010, I served a copy of the foregoing upon Defendants in the following manner and at the addresses below:

Via electronic delivery and first class mail to:


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Paul A. Hemmersbaugh
Sidley Austin LLP
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Counsel for CSXT

Via first class mail to:

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PUBLIC VERSION

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Thomas Burden, General Manager Georgia Woodlands Railroad, LLC 210 Depot Street P.O. Box 549 Washington, GA 30673	



Jeffrey O. Moreno

Exhibit 1

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TOTAL PETROCHEMICALS USA, INC.)

Complainant,)

v.)

CSX TRANSPORTATION, INC., ET AL.)

Defendant.)

Docket No. 42121

**MOTION TO COMPEL
OF TOTAL PETROCHEMICALS USA, INC.**

Pursuant to 49 C.F.R. § 1114.31(a), Complainant TOTAL Petrochemicals USA, Inc. ("TPI"), hereby moves the Surface Transportation Board ("STB" or "Board") to compel CSX Transportation, Inc. ("CSXT") to respond to TPI's "Seventh Set of Discovery Requests" ("Discovery Requests") in the above-captioned proceeding. CSXT has unjustifiably refused to provide information and data in response to TPI's Discovery Requests. In this Motion, TPI asks the Board to order CSXT to provide responses to its Discovery Requests. Exhibit A contains a copy of CSXT's objections.

I. BACKGROUND

TPI's Discovery Requests consist of two Requests for Production of Documents ("RFP") related to CSXT's internal costs. In RFP No. 165, TPI has requested the following information from CSXT:

Please produce all documents encompassing, referring or relating to any studies or analyses conducted by CSXT since 2006 pertaining to the profitability of the revenue generated by the transportation rates charged by CSXT to TPI for the Issue Movements.

PUBLIC VERSION

In RFP No. 166, TPI has requested the following information:

Please produce all documents encompassing, referring or relating to any methodology including all computer programs (in both compiled and non-compiled versions); databases; and documentation used by CSXT for internal management purposes to determine its costs of handling the Issue Movements as well as any and all adjustments to any methodology to account for special studies.

CSXT has objected to both Discovery Requests as “not relevant to whether the Challenged Rates are reasonable under the stand-alone cost constraint, or to any other subject properly at issue in this case” See “Defendant’s Responses and Objections to Complainant’s Seventh Set of Discovery Requests,” attached hereto as Ex. A, pp. 2 and 3. In addition, CSXT has objected to these Requests to the extent they call for production of internal costing data.

TPI has posed these Discovery Requests, not for purposes of stand-alone costs or rate reasonableness, but to elicit critical information that is relevant to CSXT’s market dominance over the issue traffic. This information is necessary to determine the cost advantage that CSXT enjoys over alternative transportation modes. This information, in conjunction with CSXT’s dominant market share, is a relevant indicator of market dominance according to Board precedent. See, FMC Wyo. Corp. v. Union Pac. R.R., 4 S.T.B. 699, 718 (2000) (“FMC”).

II. ARGUMENT

A. The Legal Standard for Motions to Compel.

The Board will grant motions to compel discovery that are reasonably drawn. Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 548 (1985) (“Guidelines”). The Board’s discovery rules permit “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). These rules grant Complainants broad discovery rights, which follow the policies reflected in the Federal Rules of Civil

PUBLIC VERSION

Procedure. E.g., Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub No. 1), slip op. at 68-69 (“Our discovery rules follow generally those in the Federal Rules of Civil Procedure”) (served Sept. 5, 2007).

A motion to compel discovery must state, with particularity, the nature and substance of the charges that the petitioner seeks to prove, as well as the basis for the petitioner’s belief in those charges. Guidelines at 548. In addition, “the discovery requested must be reasonably tailored to the particular charges to be proved and reflect the least intrusive means of obtaining the information.” Id. The motion should set forth adequate procedures to protect the confidentiality of the information sought. Id. TPI satisfies each of these factors in this Motion to Compel.

B. CSXT’S Internal Costs Are Relevant To The Issue Of Market Dominance.

As a prerequisite to determining the reasonableness of the challenged rates in this proceeding, the Board must determine whether CSXT possesses market dominance over the issue traffic. 49 U.S.C. § 10707(b) and (c). Market dominance is the “absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.” Id. § 10707(a). It has quantitative and qualitative components, of which the qualitative component is relevant here. See E.I. DuPont de Nemours & Co. v. CSX Transp., Inc., STB Docket No. 42099, slip op. at 2 (served June 27, 2008) (“DuPont”). One element of the qualitative analysis is intermodal competition. Mkt. Dominance Determinations & Consideration of Prod. Competition, 365 I.C.C. 118, 131 (1981). An absence of effective intermodal competition exists if the intermodal competition cannot restrain rail rates to a reasonable level. DuPont, at 5.

The effectiveness of intermodal competition is likely to play a prominent role in the determination of market dominance in this proceeding. Over 95% of the case lanes involve the

PUBLIC VERSION

transportation of three polymers (polyethylene, polypropylene, and polystyrene), which are transported in the form of plastic pellets. These polymers can move by truck, and do move by truck, in certain circumstances. Furthermore, they can be transloaded between rail and truck. Therefore, CSXT is likely to allege that intermodal transportation of polymers is an effective competitive constraint upon its rail rates to TPI.

Indeed, CSXT already has asserted that intermodal transportation alternatives constitute effective competitive constraints in its "Motion for Expedited Determination of Jurisdiction Over Challenged Rates," filed on October 1, 2010. Through the Verified Statement of Gordon R. Heisler, at pages 13-15, CSXT contends that 78 case lanes could be transported by rail carriers other than CSXT to rail-truck transloading facilities for delivery by truck to the final destination {{ [REDACTED] }}.¹ According to CSXT, this constitutes such clear and compelling evidence that it lacks market dominance that the Board should deviate from the procedural schedule in this case, which is based upon established Board procedures, and decide market dominance before the parties submit evidence on rate reasonableness.

The existence, however, of an intermodal alternative {{ [REDACTED] }} is not dispositive of effective intermodal competition. Ariz. Pub. Serv. Co. v. United States, 742 F.2d 644, 651 (D.C. Cir. 1984) ("Arizona") ("[T]he mere existence of some alternative does not in itself constrain the railroads from charging rates far in excess of the just and reasonable rates that Congress thought the existence of competitive pressures would ensure."). The Board underscored this principle in DuPont by stating that comparable pricing does not indicate effective competition. DuPont, at 7 ("Even if we were to find that the cost of

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PUBLIC VERSION

[an alternative] is similar to the cost of using rail . . . , it does not follow that the threat of [the alternative] is evidence of effective competition.”) (emphasis in original). An alternative mode’s pricing may be a poor indicator of effective competition because the pricing may merely create an “outer limit” rather than an effective competitive constraint. *Id.*, at 8 (citing *FMC*, 4 S.T.B. at 718 (“[An] alternative does impose an outer limit on the rate that [a carrier] can charge, although [the carrier] can exercise considerable market power before reaching that outer limit.”); *Arizona*, 742 F.2d at 651 (“At some point the availability of an alternative such as the horse and buggy or even people carrying oil in buckets theoretically prevents railroads from raising their rates beyond an outer bound.”))).

Determining whether a rate for an alternative transload option is an effective competitive constraint upon CSXT’s pricing requires consideration of the relative costs of providing the two transportation alternatives. A rail carrier with a large cost advantage can raise its rate to or, depending on certain non-price advantages, above those of its intermodal alternatives without a loss in market share. In that scenario, an alternative transportation rate that is comparable to, or even below, that of a rail carrier with a dominant market share would not be an effective competitive constraint. *See FMC*, 4 S.T.B. at 718. TPI has sought discovery of CSXT’s internal costs in order to demonstrate that CSXT operates at a large cost advantage relative to the transload options that CSXT has claimed are effective competitive constraints.

{{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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}}

C. Board Precedent Permits Discovery Of CSXT's Internal Costs For The Purpose Of Proving Market Dominance.

In objecting to TPI's Discovery Requests, CSXT incorrectly makes the blanket assertion that Board precedent holds that internal costing system information is not subject to discovery. This assertion, however, is the result of a truncated reading of Board precedent, as illustrated by CSXT's incomplete quotation from Kansas City Power & Light Co. v. Union Pacific Railroad, STB Docket No. 42095 (served Feb. 15, 2006) ("KCPL"). CSXT quotes KCPL for the Board's statement that "it is contrary to Board precedent to require a party to produce internal management costing information," but leaves out the rest of the Board's sentence, which went on to say "because costs in Board proceedings are to be determined using the Board's Uniform Rail Costing System." Id. at 2. The omitted language is essential, because it emphasizes that the Board's precedent proscribing the discovery of internal costing system information has largely concerned the use of the information for rate reasonableness purposes, not market dominance.

CSXT further misconstrues the Board's precedent regarding the discovery of internal costing system information by its citation to Arizona Public Service Co. v. Atchison, Topeka & Santa Fe Railway, 2 S.T.B. 367 (1997) ("APS"). In APS, the plaintiff sought "an explanation of [the carrier's] internal system for costing movements and how that differs from [the Board's] Uniform Railroad Costing System." Id. at 371. Keeping with its precedent that internal cost system information is not relevant to rate reasonableness, the Board declined to permit the

PUBLIC VERSION

discovery, stating that “it would not use a carrier’s internal costing system information for any purpose in [its] analysis and decision.” Id. at 372. While CSXT seeks to construe this statement as a blanket prohibition on the discovery of internal costing system information, the Board was clearly only determining the relevance of the discovery to its rate reasonableness determination.

The Board’s only denial of a motion to compel internal costing system information on market dominance grounds also is inapposite to TPI’s Discovery Requests. In Potomac Electric Power Co. v. CSX Transportation, Inc., 2 S.T.B. 290, 294 (1997) (“PEPCO”), the Board denied access to CSXT’s internal costing system data, stating that it does “not use rate-cost relationships as a basis for qualitative market dominance determinations.” The plaintiff in PEPCO, however, sought merely to show that its traffic would remain very desirable to the railroad even at a considerably lower rate.

TPI seeks to use CSXT’s internal costing system information to show that CSXT’s rates, where similar to rates for transportation alternatives, are not “effectively” constrained by those alternatives because CSXT operates at a large cost advantage. The Board has held that the cost of providing a transportation service is a factor in market dominance determinations where the rail carrier and a transportation alternative charged similar rates and the carrier maintained a dominant market share. FMC, 4 S.T.B. at 717-18. TPI’s Discovery Requests seek the evidence needed to satisfy that standard.

C. CSXT’s Remaining Objections Are Frivolous And Unsupported.

CSXT has no basis for objecting to the disclosure of internal costing system information as being highly sensitive data. The protective order in this proceeding provides adequate protection for this information. When addressing carriers’ concerns regarding the protection of internal costing system information, the Board has stated that a protective order was sufficient to mitigate those concerns. CSX Transp., Inc., STB Docket No. 33388, 1997 STB LEXIS 230, at

PUBLIC VERSION

*4 (served Sept. 12, 1997). The serious consequences of violating a protective order are sufficient to deter the disclosure of the internal costing system information. Id. In addition, the Board has held that the mere fact that counsel and consultants of other parties have access to this information, which would be relevant in other matters in which they represent clients, is insufficient to deny disclosure. Id.

Likewise, CSXT's objections to RFP No. 163 on the basis of ambiguity, undue burden, and being overbroad are improper. The request is not ambiguous; it simply seeks documents addressing the extent to which the revenue that CSXT generates from the rates it charges TPI exceed CSXT's costs of providing that service. In addition, the request is narrowly tailored to the transportation rates at issue and will lead to the discovery of market dominance information related only to such rates.

CSXT also claims that the Discovery Requests are unduly burdensome and overbroad to the extent that they seek information dating to 2006. But, when TPI raised similar objections in response to CSXT's market dominance discovery requests, CSXT asserted that information from 2006 was "extraordinarily relevant" to market dominance. Letter from Paul A. Hemmersbaugh to Jeffrey O. Moreno, p. 2 (July 30, 2010) (attached as Exhibit C). TPI ultimately agreed to produce information back to 2006.

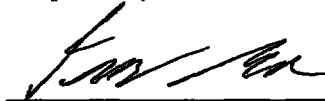
Finally, other than general assertions, CSXT has not provided any support for its overbroad and burden objections.

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III. CONCLUSION

For the foregoing reasons, TPI respectfully requests that the Board order CSXT to respond to TPI's Seventh Set of Discovery Requests, served October 11, 2010.

Respectfully submitted,



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November 4, 2010

EXHIBIT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TOTAL PETROCHEMICALS USA, INC. Complainant v. CSX TRANSPORTATION, INC. Defendant	Docket No. NOR 42121
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**DEFENDANT'S RESPONSES AND OBJECTIONS TO COMPLAINANT'S SEVENTH
SET OF DISCOVERY REQUESTS**

Pursuant to 49 C.F.R. Part 1114 and other applicable rules and authority, CSX Transportation, Inc. ("CSXT"), through undersigned counsel, submits the following Responses and Objections to Complainant Total Petrochemicals USA, Inc.'s ("TPI") Seventh Set of Discovery Requests.

CSXT incorporates and adopts all of the General Objections set forth in CSXT's Responses and Objections to Complainant's First Requests for Admission, Interrogatories, and Requests for Production of Documents (served June 23, 2010) and in CSXT's Responses and Objections to Complainant's Third Set of Discovery Requests (served August 16, 2010). CSXT's incorporation and adoption of those General Objections includes, but is not limited to, CSXT's objections to the Definitions and Instructions that were set forth in TPI's First Discovery Requests. CSXT's objections shall not waive or prejudice any objections that it may later assert.

SPECIFIC OBJECTIONS AND RESPONSE

In addition to its General Objections, below CSXT sets forth Specific Objections and Responses to the Seventh Set of Discovery Requests. CSXT preserves all of its General Objections set forth above, and none of the following Specific Objections shall waive its General

Objections. Nor shall any of CSXT's specific objections limit the scope, breadth, generality, or applicability of those General Objections.

REQUEST FOR PRODUCTION NO. 165

Please produce all documents encompassing, referring or relating to any studies or analyses conducted by CSXT since 2006 pertaining to the profitability of the revenue generated by the transportation rates charged by CSXT to TPI for the Issue Movements.

Response:

CSXT objects to this Request as repetitive and unduly burdensome in that it overlaps with the information demanded in TPI's Request for Production No. 2. CSXT also objects to the vague, ambiguous, and undefined term "profitability of the revenue." CSXT further objects to Request No. 165 to the extent that TPI's request for "profitability" studies and analyses calls for the production of CSXT's internal costing data. CSXT has already produced revenue data. TPI's request for "profitability" studies, when coupled with its requests for the actual revenue data that CSXT has already produced, constitutes an impermissible attempt to obtain internal railroad costing data that the Board has long held is not subject to discovery in a SAC case. *See, e.g., Kansas City Power & Light Co. v. Union Pac. R.R. Co.*, STB Docket No. 42095 (served Feb. 15, 2006) ("it is contrary to Board precedent to require a party to produce internal management costing information"); *Arizona Pub. Serv. Co. v. Atchison, T. & Santa Fe Ry. Co.*, 2 S.T.B. 367, 372 (1997). Moreover, the "the profitability of the revenue generated by the transportation rates charged by CSXT to TPI for the Issue Movements" is not relevant to whether the Challenged Rates are reasonable under the stand-alone cost constraint, or to any other subject properly at issue in this case. CSXT further objects to this Request as overbroad and unduly burdensome in that it is not limited to a reasonable scope of time and instead seeks information since 2006.

REQUEST FOR PRODUCTION NO. 166

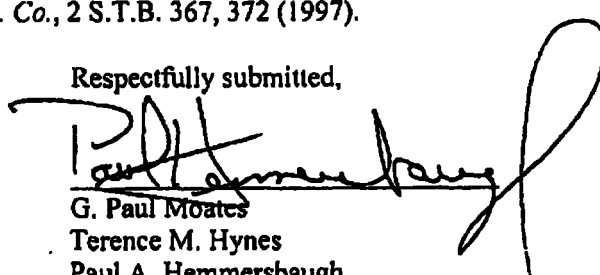
Please produce all documents encompassing, referring or relating to any methodology including all computer programs (in both compiled and non-compiled versions); databases; and documentation used by CSXT for internal management purposes to determine its costs of handling the Issue Movements as well as any and all adjustments to any methodology to account for special studies.

Response:

CSXT objects to this request for production of internal management costing data and programs, which are not relevant to whether the challenged rates are reasonable under the stand-alone cost constraint, or to any other subject properly at issue in this case. Board precedent plainly holds that such information is not subject to discovery. *See, e.g., Kansas City Power & Light Co. v Union Pac. R.R. Co.*, S'FB Docket No. 42095 (served Feb. 15, 2006) ("it is contrary to Board precedent to require a party to produce internal management costing information"); *Arizona Pub. Serv. Co. v. Atchison, T. & Santa Fe Ry. Co.*, 2 S.T.B. 367, 372 (1997).

Peter J. Shultz
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Respectfully submitted,



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Counsel to CSX Transportation, Inc.

Dated: November 1, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2010, I caused a copy of the foregoing Responses and Objections to Complainant Total Petrochemicals USA, Inc.'s Seventh Set of Discovery Requests to be served on the following by electronic mail and by First Class U.S. Mail, postage prepaid:

Jeffrey O. Moreno
David E. Benz
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, DC 20036

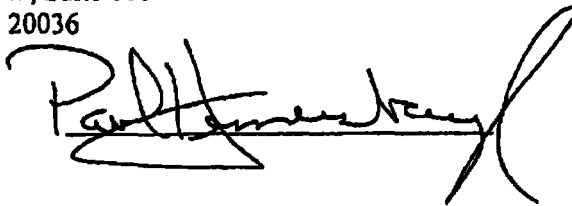
A handwritten signature in black ink, appearing to read "Paul H. Hines", is written over a horizontal line.

EXHIBIT B

"Highly Confidential"

EXHIBIT C



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FOUNDED 1886

July 30, 2010

By Electronic Mail and Hand

Jeffrey O. Moreno
Thompson Hine LLP
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Re: *Total Petrochemicals USA, Inc. v. CSX Transportation, Inc.*, STB Docket No. 42121

Dear Jeff:

This letter addresses the Objections and Responses of Total Petrochemicals USA, Inc. to Defendant CSX Transportation, Inc.'s ("CSXT") First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents ("Discovery Responses"), served July 23, 2010. We are writing to express several questions and concerns CSXT has with some of the objections raised by Total Petrochemicals USA, Inc. ("TPI"). We look forward to cooperating with you to resolve these questions and concerns without the need to burden the Board with discovery motions, and hope to resolve many, if not all, of these issues at our meeting in August.

This letter does not catalog every instance where there is ambiguity in TPI's response or where CSXT disagrees with one of TPI's objections and responses. Instead, this letter focuses on the most significant questions arising from TPI's Discovery Responses. CSXT reserves its rights to address additional concerns with TPI's Discovery Responses at a later date. In addition, for the many responses with respect to which TPI has promised to produce responsive documents or information, CSXT will reserve judgment on the adequacy of TPI's response until it has an opportunity to review the promised information.

1. General Objection 8

TPI objects to CSXT's discovery requests to the extent they apply to TPI's "affiliates, subsidiaries, the parent of TPI, or other entities that do not produce the Issue Commodities in the United States." This objection is not well-founded. In a decision repeatedly cited by TPI when demanding discovery of CSXT, the Surface Transportation Board made clear that discovery may properly reach corporate affiliates of a litigant in a SAC case. *See Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.*, STB Docket No. 42110 (served Feb. 17, 2009). To the extent that TPI's corporate affiliates have information or documents responsive to

Jeffrey O. Moreno
July 30, 2010
Page 2

CSXT's discovery requests, that information is plainly within TPI's "possession, custody, or control" and must be produced. Moreover, TPI's statement that it will "make reasonable inquiries of those individuals most likely to possess information or documents responsive to each Interrogatory or Request for Production" is unduly narrow. TPI has not explained how it will make the subjective determinations of which individuals are "most likely" to possess information or what "reasonable inquiries" it plans to make. TPI has an obligation to produce any responsive information in the possession of TPI employees, and at a minimum TPI's search for responsive information must encompass any employee or agent who may possess responsive information. Please confirm that TPI's discovery production will include information from its corporate affiliates and that TPI will not limit its discovery efforts to inquiries of employees that it asserts are "most likely" to possess responsive information.

2. General Objection 10

TPI indicates that it will respond to discovery by "mak[ing] reasonable inquiries into files where responsive information and documents are most likely to be found." This is an unduly narrow approach, which would not satisfy TPI's discovery obligations. This is major rate reasonableness litigation in which TPI has propounded hundreds of discovery requests, and CSXT employees and agents are devoting thousands of hours to responding to those requests. TPI certainly may not limit unilaterally its own discovery response efforts to a review of files it subjectively deems "most likely" to contain responsive information. Please confirm that TPI will fully investigate and search all information services including, but not limited to any paper and/or electronic files or data within its possession, custody, or control that may contain responsive information to ensure that TPI produces all responsive information.

3. Interrogatory 38

TPI has objected to producing any responsive information related to its use of alternative transportation prior to January 1, 2008 on the ground that earlier information is "overbroad" and "unduly burdensome." TPI's actual use of alternative transportation for the Issue Commodities is extraordinarily relevant to the subject of market dominance, and its use of such transportation in 2006 and 2007 is just as relevant as any use since 2008. CSXT has limited the vast majority of its discovery requests to post-2008 information, and it is not unduly burdensome for TPI to produce information from 2006 and 2007 in response to this interrogatory. TPI also objects to this interrogatory "to the extent it seeks information about transportation other than Issue Movements." But TPI's use of alternative transportation for any movements of the Issue Commodities is highly relevant to whether alternative transportation is feasible for the Issue Movements. Please clarify the scope of documents TPI intends to search for and/or produce in response to this request.

Jeffrey O. Moreno
July 30, 2010
Page 3

4. Interrogatory 46

TPI raises a number of objections to this interrogatory, including an objection to the extent it seeks information about TPI's use of trucks to transport commodities other than the Issue Commodities. Information about TPI's use of truck transportation for such commodities is relevant to assessing the viability of truck transportation of the Issue Movements. Please clarify the scope of documents TPI intends to search for and/or produce in response to this request.

5. Interrogatories 48 and 49

These interrogatories request TPI to state whether it contends that the Issue Rates will materially affect the viability of or cause the closure of any TPI Production Facility. TPI refuses to answer these interrogatories, claiming that they are irrelevant. However, several recent SAC complainants (some of which were represented by TPI's present counsel) have sought preliminary injunctive relief from the STB claiming that challenged rates should be enjoined because they threaten the economic viability of a plant or facility. These interrogatories are plainly relevant to any similar allegations or request for relief that TPI may submit. If TPI pledges that it will not file a petition or other request for injunctive or other preliminary remedy concerning the challenged rates, and that it will not allege that the challenged rates threaten the economic viability of any facilities or operations of TPI or its customers, CSXT will withdraw Interrogatories 48 and 49. Otherwise TPI is obliged to provide full, substantive answers.

6. Interrogatories 51 and 52

Each of these interrogatories requests information relevant to the production volume and capacity of TPI's facilities. TPI flatly refuses to respond, on the ground that such information is "irrelevant . . . to the rate reasonableness standards of the Board." On the contrary, this information is highly relevant to *inter alia*, a key factor in the SAC analysis: namely, the expected volume of Issue Movements. The SAC analysis requires projections of TPI's future volumes of Issue Movements over a ten-year SAC analysis period, and the requested information about TPI's production capabilities and facilities is relevant and must be produced.

7. Interrogatory 54

Interrogatory 54 requests information in TPI's possession, custody, or control related to competing or substitute products that could replace the Issue Commodities. Such information is highly relevant to establishing projected future volumes of the Issue Commodities. For example, evidence that TPI's sales of some or all of the Issue Commodities are subject to vigorous

Jeffrey O. Moreno
July 30, 2010
Page 4

competition from other sellers of the Issue Commodities (or sellers of products that could be substituted for the Issue Commodities) would counsel against overly optimistic projections of the future volumes of Issue Movements. This relevant information must be produced. Moreover, TPI's statement that responsive information "would be in the possession, custody or control of third parties" is not a permissible or adequate basis for refusing to search for and produce responsive information. TPI is required to produce information in its possession, custody or control, and the possibility that other third parties also might have responsive information is not relevant to TPI's discovery obligations.

8. Interrogatories 55 and 56 and Request for Production 14-15

For the reasons discussed above (*See e.g.*, Items 6-7, *supra*), information concerning future volumes of Issue Movements is a critical part of the SAC analysis and plainly is a proper subject of discovery. TPI's refusal to respond to discovery requests for forecasts in its possession is indefensible, and its boilerplate objection that requests for forecasts are irrelevant, unduly burdensome, and overbroad is unavailing. These requests are plainly relevant to this case, and there is nothing overbroad or unduly burdensome about asking TPI to produce its recent internal forecasts.

9. Requests for Production 3 & 4

TPI objects to producing responsive documents related to its use of alternative transportation prior to January 1, 2008 on the ground that earlier information is "overbroad" and "unduly burdensome." For the reasons discussed above for Interrogatory 38 (Item 3, *supra*), TPI's use of alternative transportation for the Issue Commodities in 2006 and 2007 is highly relevant to market dominance, and it is not unduly burdensome for TPI to produce information from 2006 and 2007 in response to these requests.

10. Request for Production 5

TPI represents that it has no maps or diagrams in its possession, custody or control showing any land ownership or property rights as to real property within ten miles of any TPI Production Facility. This response is surprising, both because TPI presumably has property rights or interests in the major industrial facilities that constitute the TPI Production Facilities (and/or adjacent or nearby real property or improvements) and because TPI's responses to CSXT's Requests for Admission make a number of representations about the ownership of property around TPI's facilities. Please clarify your response and explain why TPI has no responsive documents or information.

Jeffrey O. Moreno
July 30, 2010
Page 5

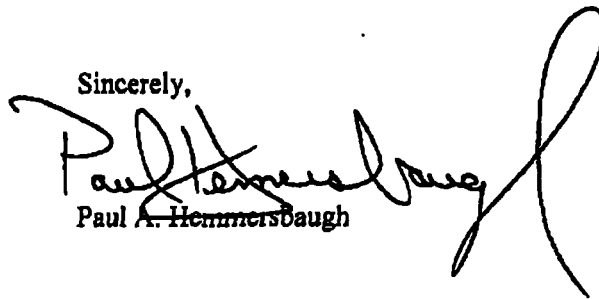
11. Request for Production 7

TPI makes a series of objections to this request, but states that it will produce responsive documents. Please clarify whether TPI is planning to withhold responsive documents as a result of its objections.

* * *

We look forward to our meeting in early August and hope that we can resolve the parties' differences concerning the forgoing and other discovery matters. If you wish to discuss this letter before our meeting, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Hemmersbaugh", with a large, stylized flourish extending from the end of the signature.

Paul A. Hemmersbaugh

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that this 4th day of November 2010, I served a copy of the foregoing Motion to Compel upon Defendants in the following manner and at the addresses below:

Via hand-delivery to:

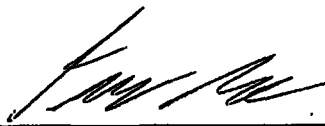
G. Paul Moates
Sidley Austin LLP
1501 K Street, NW
Washington, D.C. 20005
Counsel for CSXT

Via first class mail to:

Lamont Jones, General Manager Carolina Piedmont Division 268 E. Main Street Laurens, SC 29360	Cathy S. Hale, Chief Executive Officer Madison Railroad City of Madison Port Authority 1121 W. JPG Woodfill Road #216 Madison, IN 47250
Jeff Collins, General Manager Mohawk, Adirondack & Northern Railroad Corp. 1 Mill Street, Suite 101 Batavia, NY 14020	William J. Drunsic, President Nashville and Eastern Railroad Corp. 514 Knoxville Avenue Lebanon, TN 37087
Bernard M. Reagan, Senior Vice President Seminole Gulf Railway L.P. 900 W.C. Owens Avenue Clewiston, FL 33440	Lucinda K. Butler, Director South Branch Valley Railroad 120 Water Plant Drive Moorefield, WV 26836
G.R. Abernathy, President Sequatchie Valley Railroad Company 120 Souland Square Bridgeport, AL 35740	Paul G. Nichini, President New Hope & Ivyland Railroad 32 West Bridge Street New Hope, PA 18938

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